



**PACIFIC LEGAL  
FOUNDATION**

April 15, 2019

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**ELECTRONICALLY VIA [www.regulations.gov](http://www.regulations.gov)  
AND FIRST-CLASS MAIL**

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Re: Docket ID No. EPA-HQ-OW-2018-0149  
Comments on EPA/Army Corps 2019 Proposed Regulation  
Defining “Navigable Waters” under the Clean Water Act

Dear Mr. McDavit and Ms. Moyer:

**Introduction**

Pacific Legal Foundation, Competitive Enterprise Institute, Oregon Cattlemen’s Association, and Washington Cattlemen’s Association are pleased to submit the following comments on the EPA and the Army’s proposed regulation defining “navigable waters” under the Clean Water Act. 84 Fed. Reg. 4154 (Feb. 14, 2019). We commend the agencies for taking a necessary first step to reform decades of overexpansive regulation of non-navigable waters under the Act. While the following comments detail several improvements that we think are necessary for the proposed rule to be legally defensible, the proposal is a very strong first step.

These comments begin with a textual analysis of the applicable terms of the Clean Water Act. Regardless of the direction indicated in President Trump’s Clean Water Act Executive Order, or any prior regulatory interpretations of the statute, the agencies are engaged first and only in the proper interpretation of the Act, subject to applicable controlling Supreme Court interpretations. Any regulatory latitude the agencies may enjoy is bounded by the reasonable limits of the interpretation of the statute; hence, a sound interpretation of the text is the first step.

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The comments then identify the requirements of the *Rapanos* plurality opinion, and analyze the proposed rule against those requirements. The result of this analysis is that the proposed rule’s definitions of regulated tributaries, adjacent wetlands, ditches, lakes and ponds, and impoundments require revision in order to fall within the bounds of the *Rapanos* plurality. To be clear, these are not merely policy judgements within the reasonable bounds of the agencies’ interpretive warrant under the *Chevron* doctrine. Rather, these errors take the proposal outside of the range of reasonable interpretations of the statute, and would cause the proposed rule to fail in a judicial challenge at the *Chevron* Step One analysis.

Finally, we provide suggestions for how to modify the proposed rule to cure these deficits.

### **Textual Analysis of the Clean Water Act**

#### **Prior Use of “Navigable Waters of the United States”**

Proper interpretation of the phrase “navigable waters” begins with an understanding of prior use of the phrase in relevant statutes. *See Rapanos v. United States*, 547 U.S. 715, 723 (2006). For over a hundred years, the United States Congress regulated the obstruction of navigation on rivers and lakes through a series of statutes that applied to “navigable waters of the United States.” *See id.* In a line of cases originating with *The Daniel Ball*, the Supreme Court of the United States interprets this term to refer to

[t]hose rivers . . . which are navigable in fact[, i.e.] . . . when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. 557, 563 (1870); *see also Rapanos*, 547 U.S. at 723. Federal courts can take judicial notice of whether or not a given river or lake is navigable-in-fact, although the precise portions of it that are navigable may require consideration of evidence. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899).

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The phrase “navigable waters of the United States” was used in Section 10 of the Rivers and Harbors Act (“Section 10”) when that statute was first adopted in 1899, Mar. 3, 1899, c. 425, § 10, 30 Stat. 1151, and remains in use today, 33 U.S.C. § 403. Section 10 prohibits obstructions of “the navigable capacity of the waters of the United States” unless authorized by Congress. 33 U.S.C. § 403. Section 10 lists several types of water bodies in addition to the channels of the “navigable waters of the United States” that the Army Corps also regulates under the Rivers and Harbors Act: “port[s], roadstead[s], haven[s], harbor[s], canal[s], lake[s], harbor[s] or refuge[s], or inclosure[s] within the limits of any breakwater[.]” 33 U.S.C. § 403.

#### The Clean Water Act

In 1972, Congress adopted significant amendments to the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, which has since been called the Clean Water Act (the Act). The Act prohibits unpermitted discharges, defined as additions of pollutants from point sources to navigable waters. 33 U.S.C. §§ 1311(a), 1362(12). The Act assigns general permitting authority to the EPA, with specific permitting authority assigned to the Army Corps of Engineers to permit discharges of dredged or fill material. 33 U.S.C. §§ 1342(a)(1), 1344(a). So, the meaning of the term “navigable waters” is what determines whether any particular action is prohibited and/or subject to permitting by the Act. The Act defines “navigable waters” to “mean[] the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

The Act’s words “navigable waters” and “waters of the United States, including the territorial seas,” are very close to the predecessor statutes’ words “navigable waters of the United States” and the expression “navigable capacity of the waters of the United States” that have appeared since 1899 in Section 10 of the Rivers and Harbors Act. This evinces a congressional intent that the terms in the two statutes be interpreted in a closely related way. The only material variation in the terms is the Clean Water Act’s introduction of the term “the territorial seas.” This indicates that the Act applies to navigable-in-fact waters as defined in *The Daniel Ball* and referenced in Section 10 of the Rivers and Harbors Act, plus downstream waters to and including the territorial seas.

Nothing in the Act’s definition of “navigable waters” extends the term to non-navigable waters of any sort (e.g., non-navigable tributaries and “adjacent waters”) that are upstream of or isolated from navigable-in-fact waters. Nothing in the legislative history of the Act shows that Congress “intended to exert anything more than its commerce power over navigation.” *Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng’rs*, 531 U.S.

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159, 168 n.3 (2001) (SWANCC). In contrast, when Congress has intended to extend its reach to waters that are not navigable, it has said so expressly. For instance, with the Flood Control Act of 1936, Congress claimed jurisdiction over “navigable waters or their tributaries, including watersheds thereof.” 33 U.S.C. § 701(a); 49 Stat. 1570.

The Supreme Court has identified one provision of the Act, 33 U.S.C. § 1344(g)(1) (“Section 404(g)(1)”), as the sole basis for reading “navigable waters” to include any non-navigable waters upstream of rivers or lakes that are navigable-in-fact. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 135-39 (1985), SWANCC, 531 U.S. at 171 (Section 404(g)(1) not dispositive of meaning of “navigable waters”); *id.* at 169 n.5 (Section 404(g)(1) falls short of congressional acquiescence in agency practice). However, the Supreme Court has never ruled on the precise meaning of the “other waters” provision of Section 404(g)(1), other than to hold in *Riverside Bayview* that it reasonably includes wetlands immediately abutting navigable-in-fact lakes, 474 U.S. at 134, in SWANCC that it does not include isolated ponds, 531 U.S. at 171-72, and to rule in *Rapanos* that the Act does not reasonably encompass all non-navigable tributaries or adjacent wetlands, 547 U.S. at 734; *id.* at 787 (Kennedy, J., concurring in judgment).

Section 404(g)(1) provides evidence that the Act defines “navigable waters” to mean “waters of the United States, including the territorial seas” in order to gather within one term those waters that are navigable-in-fact and two categories of waters downstream of them: waters subject to the ebb and flow of the tide, and the territorial seas. Waters subject to the ebb and flow of the tide were expressly not covered by *The Daniel Ball* definition. 77 U.S. at 563. And, the tides are not mentioned in Section 10 of the Rivers and Harbors Act. Particular waters subject to the ebb and flow of the tide might be navigable-in-fact and thus within *The Daniel Ball*’s definition, but the role of the tide is neither here nor there in whether they were navigable-in-fact. But the Clean Water Act, by referencing waters subject to the ebb and flow of the tide in Section 404(g)(1), clearly expands on navigable-in-fact waters by adding these tidal waters, which are generally seaward (or are the seaward portion) of rivers and lakes that are navigable-in-fact.

As mentioned, Section 10 does not cover waters subject to the ebb and flow of the tides, and its collection of “other waters” (i.e., “ports” to “inclosures”) are the best available textual candidate to be “other than” the specific waters called out in Section 404(g)(1): navigable-in-fact waters and waters subject to the ebb and flow of the tide. That is to say, the “other than” waters for which Section 404 permitting is delegable to the states under Section 404(g)(1) are precisely the specific water bodies listed in Section 10 (“ports” to “inclosures”).

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The territorial seas were never expressly included within the scope of *The Daniel Ball*'s definition. This stands to reason since congressional statutes to prevent states from interfering with the transport of goods in interstate and foreign commerce would not have been concerned with state efforts to place fill as much as three miles out to sea. And as expected, no Supreme Court decision citing *The Daniel Ball* deals with the oceans. The Clean Water Act's definition of "navigable waters" includes the territorial seas, but Section 404(g)(1) does not, since they would not be within the jurisdiction of any state. This also reinforces the reading of the Act's definition of "navigable waters" and Section 404(g)(1) in concert with Section 10 of the Rivers and Harbors Act, that the only non-navigable waters regulated by the Clean Water Act are the list of waters, from "ports" to "inclosures," listed in Section 10 of the Rivers and Harbors Act.

Additional textual indications that "navigable waters" should be read very similarly to Section 10's "navigable waters of the United States" are in the Clean Water Act's purpose section. 33 U.S.C. § 1251. Section 1251(a) sets forth the federal water quality purposes of the Act and articulates the overarching objective to "restore and maintain the . . . integrity of the Nation's waters." Section 1251(a)(1), in order to achieve that objective, declares "the national goal that the discharge of pollutants into the navigable waters be eliminated[.]" But Section 1251(b) establishes the Act's federalism purpose to "recognize, preserve, and protect the primary rights of States to . . . plan the development and use (including restoration preservation, and enhancement) of land and water resources."

These terms ("Nation's waters," "navigable waters," and "water resources") in close proximity show that "navigable waters" should be given a relatively narrow reading compared to all-encompassing terms like the "Nation's waters" (the integrity of which is to be restored and maintained through a wide range of methods, only one of which is regulation of discharges to "navigable waters") and "water resources" (over which the primary authority of the states is recognized and protected, presumably by not subjecting such waters to federal permitting).

And, the Act's purpose section clearly protects water rights recognized under state law, which broadly allow diversion of water from its natural course for beneficial use elsewhere, whether under riparian or appropriative legal regimes. 33 U.S.C. § 1251(g). Such water rights frequently involve the placement of dams or other diversion works in non-navigable tributaries and the use of substantially all of the flow of those tributaries during the irrigation season or longer. The recognition and strong protection of these rights within the Act's purpose section also indicates a reading of "navigable waters" as

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not including non-navigable tributaries from which significant amounts of water can be diverted under state law.

### Conclusion of Textual Analysis

In sum, a textual analysis of the Clean Water Act term “navigable waters” meaning “the waters of the United States, including the territorial seas,” shows that the waters that the Act regulates are closely related to those defined in *The Daniel Ball* and specified in Section 10 of the Rivers and Harbors Act, with the addition of downstream waters subject to the ebb and flow of the tide and the territorial seas. The only indication in the text of the Act that “navigable waters” includes non-navigable waters upstream of “navigable waters of the United States” is Section 404(g)(1), whose “other waters” provision is best understood as allowing states to regulate the specific types of water bodies enumerated in Section 10 of the Rivers and Harbors Act. Nothing in the text of the Act supports the inclusion of non-navigable tributaries, as such, within the meaning of “navigable waters.” See *SWANCC*, 531 U.S. at 168 (no “persuasive evidence that [Army Corps] mistook Congress’ intent in 1974” when it initially defined “navigable waters” consistently with *The Daniel Ball*).

While Section 404(g)(1) brings adjacent wetlands into the ambit of the Act, that inclusion is limited to wetlands adjacent to (1) navigable-in-fact waters used or susceptible to use to transport goods in interstate commerce, and (2) waters subject to the ebb and flow of the tide. By negative implication, the Act forecloses the regulation of other wetlands, regardless of their relationship to tributaries and other non-navigable water bodies. Accord *Riverside Bayview Homes*, 474 U.S. at 131 (wetland at issue adjacent to “Black Creek, a navigable waterway”); *id.* at 131 n.8 (opinion limited to wetlands “adjacent to open bodies of water”).

### Constitutional Limits on the Meaning of Navigable Waters

The interpretation of “navigable waters” is also subject to constitutional constraints. Under the canon of constitutional avoidance, the agencies should interpret the Act so as to avoid giving it a constitutionally suspect meaning. In this vein, any interpretation that would extensively regulate a wide range of non-navigable tributaries or non-abutting wetlands would raise issues under the Commerce Clause, the Non-Delegation Doctrine, the Due Process Clause, and the Tenth Amendment.

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### Commerce Clause and the Tenth Amendment

The Supreme Court held in *SWANCC* that the Act lacks a “clear statement” of congressional intent to exercise the Commerce Power to its outer limits. 531 U.S. at 172-74. Reading the statute broadly would authorize federal regulation over a wide range of very local decisions involving water resources and closely regulate land use and planning, all traditionally state and local government functions which are explicitly protected from invasion by Section 1251(b). According to the Supreme Court, reading the Act to allow this would violate the Clear Statement Rule and is impermissible. *SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 737-38.

The Supreme Court also held in *SWANCC* that the legislative history of the Act only supports the exercise of the Commerce Power over its traditional object: the transport of goods in interstate commerce through navigation. 531 U.S. at 168; *id.* at 168 n.3. Any reading of “navigable waters” that authorizes regulation substantially beyond waters used to transport interstate commerce would violate the Clear Statement Rule and Supreme Court precedent.

For very similar reasons, a broad reading of “navigable waters” would violate the Tenth Amendment’s reservation of powers to the states, including the states’ traditional authority over land use and water resource allocation which are expressly recognized and protected in the text of the Act. 33 U.S.C. § 1251(b).

### Non-Delegation Doctrine

The principle argument about the scope of “navigable waters” is how broadly it encompasses non-navigable waters. This is the policy debate that has roiled the agencies, the courts, the academy, the regulated public, and NGOs who subsist on the Act’s citizen suit provision as a business model since the mid-1970s. So far the Supreme Court has held that immediately abutting wetlands are included, that isolated ponds are not, and that some—but not all—non-navigable tributaries and some—but not all—non-abutting wetlands. The key difficulty in determining where along the continuum from “navigable-in-fact only” to “all waters, no matter how remote or insignificant,” is that the Act is utterly silent on that question.

Indeed, the agencies recognize and grapple with this reality in the preamble to the proposed rule. And it is clear that when it comes down to answering that question (absent

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any clearer interpretation from the Supreme Court), the Act is no use.<sup>1</sup> There is not one word in the Act, for example, that offers any direction or principle to determine how small a non-navigable tributary can be regulated.

As a result, to the extent that “navigable waters” under the Act were to be interpreted to include any non-navigable waters upstream of navigable-in-fact waters, the Act standing alone provides no intelligible principle for determining which non-navigable waters are included, and to that extent would violate the non-delegation doctrine.

#### Due Process Void for Vagueness and the Rule of Lenity

Similarly, because the Clean Water Act is a strict liability criminal statute, interpreting “navigable waters” as including some but not all non-navigable tributaries raises Due Process void for vagueness concerns. Any regulatory interpretation of the Act must ensure that it provides clear notice, to all those subject to potential criminal liability, of what is regulated.

The Due Process Clause requires that criminal statutes afford adequate notice of what they proscribe to those who must comply. *United States v. Lanier*, 520 U.S. 259, 265-67 (1997) (discussing doctrine, reciting elements, and citing sources). The three related considerations of constitutionally fair notice for criminal statutes include: (1) adequate specificity, such that people “of common intelligence” need not “guess at its meaning” and will not “differ as to its application;” (2) application of the rule of lenity to limit the interpretation of criminal statutes to activity clearly covered; and (3) exclusion of criminal liability where a judicial “gloss” that clarifies the law is applied for the first time. *Lanier*, 520 U.S. at 266 (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), and *Liparota v. United States*, 471 U.S. 419, 427 (1985)).

Members of the Supreme Court have weighed in on this question during the years since the *Rapanos* decision. Justice Alito has described the phrases “navigable waters” and “waters of the United States” in terms that clearly call into question whether they are void for vagueness under the Due Process Clause: “The reach of the Clean Water Act is notoriously unclear.” *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). Further, “[r]eal relief requires Congress to do what it should have done in the first place, provide a reasonably clear rule regarding the reach of the Clean Water Act.” *Id.* at 133. “Congress did not define what it meant by “the waters of the United States;” the phrase

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<sup>1</sup> Unless one reads the “other waters” provision of Section 404(g)(1) as incorporated, the other waters listed in Section 10 of the Rivers and Harbors Act.

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was not a term of art with a known meaning; and the words themselves are *hopelessly indeterminate*.” *Id.* (emphasis added).

Other members of the Supreme Court appear to have taken up the same concern. *U.S. Army Corp of Eng’rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, Thomas, Alito, JJ., concurring) (citing *Sackett*, 566 U.S. at 130-31 (Alito, J., concurring)); *id.* at 1812 (“It is often difficult to determine whether a particular piece of property contains waters of the United States.”); *id.* at 1816-17 (Kennedy, Alito, Thomas, JJ., concurring) (“[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern.”); *id.* at 1816 (citing *Sackett*, 566 U.S. at 132 (Alito, J., concurring)); see *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 625 (2018) (“In decades past, the EPA and the Corps . . . have struggled to define and apply that statutory term.”).

During oral argument in *Army Corps of Engineers v. Hawkes*, Justice Kennedy went so far as to pose the following question:

Well, I think—I think underlying Justice Kagan’s question is that the Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice. What’s the closest analogous statute that give the affected party so little guidance at the front end?<sup>2</sup>

Circuit court judges have also expressed concern about the difficulty of determining whether a given property contains “navigable waters.” See *Hawkes Co., Inc. v. United States Army Corps of Engineers*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring) (“[T]he Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction . . . . This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to your property.”); *Orchard Hill Building Company v. Army Corps*, 893 F.3d 1017, 1025 (7th Cir. 2018) (“Justice Kennedy did not define ‘similarly situated’—a broad and ambiguous term . . .”).

Given the void for vagueness concerns identified by Justices of the Supreme Court and judges of the circuit courts, the rule of lenity requires an interpretation of the Act that

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<sup>2</sup> Transcript of Oral Argument at 18:11-19, *Hawkes*, 136 S. Ct. 1807, available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2015/15-290\\_j5fl.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-290_j5fl.pdf).

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affords clear notice. This principle further reinforces that any regulated non-navigable tributary must be clearly covered by the statute.

### The *Rapanos* Opinions and *Marks* Analysis

The agencies argue that the proposed rule is based on the *Rapanos* plurality. 84 Fed. Reg. at 4170. At the same time, the agencies concede that they have attempted to combine the *Rapanos* plurality and concurrence. 84 Fed. Reg. at 4168 (“[W]hile the plurality and Justice Kennedy viewed the question of federal CWA jurisdiction differently, there are sufficient commonalities between these two opinions to help the agencies draw the line between federal and state waters.”); *see also* Ariel Wittenberg, *EPA lawyer: WOTUS rewrite isn’t ‘Scalia standard in rule form,’* E&E News, Apr. 10, 2019 (quoting EPA Principal Deputy General Counsel David Fotouhi as saying the proposal reflects both the plurality and concurrence).

But the agencies have no legal authority to base the proposed rule on a hybrid reading of the *Rapanos* opinions. Such an approach is almost certain to be held invalid in the federal courts. *Rapanos* is a fractured decision, with no majority opinion. Under *Marks v. United States*, 430 U.S. 188, 193 (1977), only one opinion (if any) supporting the judgment is eligible to be the holding of the case. The circuit courts are split on whether *Marks* even applies to *Rapanos* so as to yield a holding. The Seventh, Ninth, and Eleventh Circuits hold that the concurrence is the holding of *Rapanos* under *Marks*. *Gibson v. American Cyanamid*, 760 F.3d 600, 621 (7th Cir. 2014); *United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017); *United States v. Robison*, 505 F.3d 1208, 1221-22 (11th Cir. 2007). By contrast, the First, Third, Sixth, and Eighth Circuits hold that *Marks* does not apply to *Rapanos*. *See Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011); *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). Regulated parties with a close interest in the issue also disagree on whether and how *Marks* applies to *Rapanos*. *Compare Hughes v. United States*, Brief Amicus Curiae of Chantell and Michael Sackett and Duarte Nursery, Inc., in Support of Petitioner (Sackett/Duarte Amicus Brief), 2018 WL 620239 (plurality is holding of *Rapanos* under *Marks*), with *Hughes v. United States*, Brief Amicus Curiae for Agricultural, Building, Forestry, Livestock, Manufacturing, Mining, and Petroleum Business Interests in Support of Petitioner, 2018 WL 620238 (arguing *Marks* does not apply and *Rapanos* has no holding).

One thing in all of this confusion is clear: under *Marks* either *an* opinion supporting the judgment is the holding of a fractured opinion, or this is no holding. Developing a rule

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of law by combining disparate elements of different non-majority opinions is not an option under any known legal authority. This would be to invent an “opinion” attributed to the Supreme Court of the United States which no member of that Court authored, agreed to, or was even aware of. We are unaware of any lower court attempting such a thing with the *Rapanos* decision, or of the Supreme Court even doing so with one of its own prior fractured decisions.

Another way of considering the problem is to say that the plurality and concurrence are not side boards within which the agencies have a range of discretion to regulate under the *Chevron* doctrine. *Rapanos* offers two competing views of what “navigable waters” in the statute means. The agencies’ range of reasonable interpretation of the statute depends on which, if either, of these two views is controlling. The concurrence, if controlling, gives a very vague meaning<sup>3</sup> to the statute and *Chevron* would afford the agencies a reasonable but nonetheless fairly wide range of alternatives for giving form and intelligibility to the “significant nexus” test.

But the plurality imposes a much clearer meaning of the statute,<sup>4</sup> and the agencies have correspondingly fewer interpretive options under the *Chevron* doctrine. Under the plurality, for example, the statute is clear that only continuously flowing and relatively permanent non-navigable tributaries may be regulated, and that intermittent tributaries and ditches may not. Similarly, under the plurality, the Act is clear that only wetlands immediately abutting navigable-in-fact waters or regulated non-navigable tributaries (such that it is difficult to tell where one ends and the other begins) may be regulated. And under the plurality, the Act is clear that it does not regulate “mere trickles.”

But treating the plurality and the concurrence as the ends of an interpretive spectrum, along which *Chevron* authorizes the agencies to pick any point, is not a legally defensible option.

It would be wise for the agencies to adopt the legal position that the plurality is the controlling opinion in *Rapanos*. That position would compel the adoption of a clear

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<sup>3</sup> As we argue above, an unconstitutionally vague meaning as even its author suspected might be the case, which is one sound basis for the agencies to reject the concurrence as a legally available alternative for interpreting the Act. And, we maintain that the agencies’ 2016 Rule is not a reasonable interpretation of the Act as interpreted by the *Rapanos* concurrence, or legally supported by that opinion.

<sup>4</sup> Making the plurality the required choice compared to the concurrence under the Rule of Lenity, as explained above, regardless of the application of *Marks*.

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regulation based on that opinion, eliminate a wide range of discretionary options available for rulemaking if a vaguer interpretation of the Act forms the basis for the regulations, and significantly reduce the litigation risks involving in defending discretionary rulemaking under the Administrative Procedure Act in federal court.

So, the agencies must either base their regulations on the *Rapanos* plurality, or on the concurrence. Given the many legal vulnerabilities of the 2015 Rule and the concurrence’s “significant nexus” test, and the President’s direction to consider replacing the 2015 Rule with a new definition based on the plurality, we presume it is the agencies purpose to adopt a rule based on the plurality. The balance of these comments discuss the requirements of the plurality opinion and then assess how the proposed rule meets those requirements or not.

### **Rapanos Plurality**

#### *Non-navigable tributaries*

The *Rapanos* plurality starts with a broad rejection, as *implausible*, of interpretations of the Act that would authorize regulation of (1) intermittent surface flow in natural channels, (2) roadside ditches, (3) “irrigation ditches and drains that intermittently connect to covered waters,” (4) ephemeral flows in desert arroyos, (5) “channels that might have little water flow in a given year[.]” and (6) “man-made, intermittently flowing features such as “drain tiles, storm drains systems, and culverts.” *Rapanos*, 547 U.S. at 726-27 (citing cases); *id.* at 727-28 (citing U.S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, Waters and Wetlands, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO-04-297, p. 20-26); *see also Rapanos*, 547 U.S. at 732 n.5 (rejecting dissent’s proposed intermittent and ephemeral streams as not within the Act); *id.* at 733 n.6 (rejecting “intermittent streams” and “ephemeral streams” as “useful oxymora”); *id.* at 733-34 (excluding “channels containing merely intermittent or ephemeral flow”); *id.* at 737-38 (rejecting interpretation of the Act to cover intermittent flows); *id.* at 735-36 (rejecting the inclusion of ditches and intermittently flowing channels as “navigable waters” because the Act defines them as “point sources” instead). Alluding to the Court’s prior decision in *SWANCC*, 531 U.S. at 172, that the word “navigable” in the statute must have some of its “original substance,” the *Rapanos* plurality stated that “navigable” requires “at bare minimum, the ordinary presence of water.” 547 U.S. at 734.

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The plurality does allow for the regulation of “*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as [a] 290—day, continuously flowing stream[.] . . . Common sense and common usage distinguish between a wash and a seasonal river.” 547 U.S. at 732 n.5 (emphasis in original). This is one point where the plurality leaves some ambiguity in its interpretation of the statute. The opinion prescinds from addressing how much of the year a river must continuously flow in order to be “navigable waters” because the case before the Court did not require a decision on that point. *Id.* Hence, this is one area where the agencies have some remaining leeway to adopt a reasonable interpretation.

If the agencies do wish to regulate seasonal rivers, we recommend that this be limited to rivers that flow continuously at least 270 days a year or, perhaps in the alternative, that flow continuously for at least two full seasons and portions of both of the other two seasons. The best reading of footnote 5 is that it allows regulation of rivers that are seasonally dry, and not rivers that only flow seasonally. This is reinforced by the statement that “navigable” at least connotes the ordinary presence of water.

Another aspect of the plurality opinion, which provides the agencies with some interpretive leeway, is the lower bound of continuously flowing and relatively permanent tributaries which are included as “navigable waters.” The plurality says, 547 U.S. at 731, that “we need not decide the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act.” This was because the case did not require resolution of this question; the Court was examining agency regulations that regulated all tributaries without qualification. The plurality relied on the Clear Statement Rule to opine that the Act could not be read to press the boundaries of the Commerce Power or invade the province of state and local government control over land use and water resource allocation. 547 U.S. at 737-38.

Yet it is reasonable to expect that some continuously flowing and relatively permanent streams may be quite small and distant from navigable-in-fact waters to which they eventually flow, particularly if the agencies elect to allow regulation of seasonal rivers under footnote 5. Regulation of these water bodies would implicate the local governance and Commerce Clause concerns which the plurality relied upon to reject regulation of intermittent tributaries. 547 U.S. at 737-38. The plurality also employs an important qualitative lower limit for included non-navigable tributaries: they must be what “are described in ordinary parlance as ‘streams[, or] rivers[.]’” One would not ordinarily describe something small enough to step across in a normal stride, for example, as a

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stream and certainly not as a river, even if it were to flow continuously at some point to the Mississippi River.

Distilling the above analysis into a rule, the *Rapanos* plurality would have held that the only “plausible interpretation” of the Act “includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’ The phrase *does not include* channels through which water flows intermittently or ephemerally[.]” 547 U.S. at 739 (emphasis added) (citation omitted).

#### *Adjacent Wetlands*

The *Rapanos* plurality also rejects broad definitions of “adjacent wetlands” based on (1) hydrologic connection during flood events, (2) presence within the 100 year flood plain of another included water, (3) a 200 foot per se rule, (4) adjacency despite separation by berms and roads, (5) wetlands that do not directly abut otherwise regulated waters, and (6) insubstantial hydrologic connections. *Rapanos*, 547 U.S. at 728-29 (citing cases and GAO Report).

The plurality then addresses the question “whether a wetland may be considered ‘adjacent to’ remote ‘waters of the United States’ because of a mere hydrologic connection to them.” 547 U.S. at 740. The plurality opinion rejects the view that ecological connections between navigable waters and non-abutting wetlands render such wetlands regulable. *Rapanos*, 547 U.S. at 739-42. And, the plurality equates the terms abutting and adjacent. *Id.* at 742.

From this analysis, the plurality draws the following rule:

*only* those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that this is no clear demarcation between “waters” and wetlands, are “adjacent to” such waters and covered by the Act.

547 U.S. at 742 (emphasis in original).

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### Analysis of Proposed Regulation and Recommended Revisions

- (a) Regulated Waters
  - (1) “Traditional Navigable Waters”

This category of waters should be limited to “navigable waters of the United States” as used in the Rivers and Harbors Act and interpreted by *The Daniel Ball*. The territorial seas and waters subject to the ebb and flow of the tide could be set out as a different category, or included in this category. But the category is overbroad due to the inclusion of waters “used in interstate commerce,” rather than being limited to “waters used to transport goods in interstate commerce.” See *SWANCC*, 531 U.S. at 168 (Army Corps offered Supreme Court no persuasive evidence that its 1974 regulations, limited to navigable-in-fact waters and those subject to the ebb and flow of the tide were in error); *id.* at 168 n.3 (“[N]othing . . . in the legislative history . . . signifies that Congress intended to exert anything more than its commerce power over navigation.”).

Additional waters, which might be used only recreationally or in other ways short of navigation, may only be regulated, if at all, if they qualify as tributaries. See *Rapanos*, 547 U.S. at 726-39.

The agencies should also consider restricting the “used in the past” provision to those waters which were used in the past and are reasonably likely to be so used in the future.

Recommended revisions to proposal:

(a)(1) Waters which are currently used, or were used in the past and are reasonably likely to be used in the future, or may be susceptible to use to transport goods in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

- (2) Tributaries

The proposal includes intermittent non-navigable tributaries as regulated waters. As addressed in detail above, this violates the *Rapanos* plurality opinion, which repeatedly and unambiguously rejects the inclusion of intermittent tributaries.

Recommended revisions to proposal:

(b)(3) Ephemeral and intermittent features and diffuse stormwater run-off, including directional sheet flow over upland;

(c)(11) Tributary. The term tributary means a non-navigable river, stream, or similar naturally occurring surface water channel that contributes perennial ~~or intermittent~~ flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section ~~or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream~~. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial ~~or intermittent~~ flow to a tributary or other jurisdictional water at the upstream and downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition. A river, stream, or similar naturally occurring surface water channel is only a tributary if it is of sufficient size that an ordinary person would call it a stream or a river in the ordinary sense.

### (3) Ditches

*The Daniel Ball* waters include artificial waterways that are themselves navigable-in-fact. Ditches that fall short of this classification are not “streams” or rivers in ordinary parlance, and the *Rapanos* plurality rejects the inclusion of ditches as “navigable waters,” as addressed above. Hence, it is not necessary to separately state the inclusion of “ditches” (properly described as canals) that meet the (a)(1) definition, and there is no basis under the plurality to regulate other ditches.

Recommended revisions to proposal:

~~(a)(3) Ditches that satisfy any of the conditions identified in paragraph (a)(1) of this section, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;~~

(b)(4) Ditches that are not identified in paragraph (a)(~~3~~1) of this section;

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We note that since we recommend deleting the entirety of (a)(3) as to ditches, the agencies could preserve the existing numbering of the remaining sections by moving “the territorial seas” to (a)(3) without loss of continuity.

#### (4) Lakes and Ponds

Lakes that are navigable-in-fact are clearly within the scope of navigable in fact waters. Non-navigable lakes and ponds should only be regulated if they meet the plurality definition of tributaries, and are connected to navigable-in-fact waters by tributaries that meet the standard.

The agencies have no reasonable basis for daisy-chaining regulated waters by connecting them through non-regulated waters. Many of the non-regulated waters in subsection (b) cannot be regulated under the *Rapanos* plurality as discussed above, including ditches ((b)(4)), ephemeral drainages ((b)(3)), “water-filled depressions” ((b)(8)), and stormwater control features ((b)(9)).

Lakes and ponds that are flooded by regulated waters do not contribute any flow to navigable-in-fact rivers and lakes, and their regulation as “navigable waters” on the mere basis of receiving flood waters is rejected by the *Rapanos* plurality, as addressed above.

Recommended revisions to proposal:

~~(a)(4) Lakes and ponds that satisfy any of the conditions identified in paragraph (a)(1) of this section, Non-navigable lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (a)(1) in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (a)(1) through (5) of this section in a typical year;~~

#### (5) Impoundments

It is reasonable to include impoundments of waters properly included within the definitions of navigable-in-fact waters, non-navigable tributaries, and lakes or ponds, to the extent that those impoundments are “on-stream” of the regulated waters. But impoundments that hold water after removing it from the stream are similar to lakes and ponds which only receive flood water from otherwise regulable water bodies. And,

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most of these offstream impoundments are excluded by proposed (b)(7). The cross-reference of (b)(7) back to (a)(4) and (a)(5) creates substantial confusion as to which impoundments, ponds, lakes, and reservoirs are included and which are not. Since Section 1251(g) of the Act protects the diversion of water to storage under valid state water rights, the regulation of off-stream impoundments is foreclosed by the text of the Act. Additionally, as written, the proposal includes off-stream impoundments in tanks, cisterns, or similar closed vessels, whether used for irrigation, domestic, or other use. Frequently, users treat water stored in this manner before use, and the regulation of these types of impoundments would subject those treatments to NPDES permitting.

Also, Section 1251(g) protects state recognized water rights, and prevents a reading of the Act that would allow the agencies to regulate water diverted under valid rights at its place of storage or use.

Recommended revision to proposal:

(a)(5) On-stream non-navigable impoundments of waters identified in paragraphs (a)(1) through (4) and (6) of this section;

(6) Adjacent Wetlands

The proposed rule allows regulation of wetlands that have a minimal surface connection with navigable-in-fact rivers and lakes and their non-navigable tributaries, which is rejected by the *Rapanos* plurality, as addressed above. The *Rapanos* plurality also forecloses regulation of wetlands or other waters on the mere basis that they are receiving waters for flood waters originating in otherwise covered waters, as addressed above.

We support the clarification that wetlands separated by barriers are not adjacent. Such wetlands cannot meet the *Rapanos* plurality standard for adjacency because the barrier clearly separates them from the covered water.

Recommended revisions to proposal:

(c)(1) Adjacent wetlands. The term adjacent wetlands means wetlands that ~~abut or have a direct hydrologic surface connection to~~ a water identified in paragraphs (a)(1) through (5) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (a)(1) through (5) of this section, in such a way that there is no clear demarcation between the wetland and the covered water. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (a)(1) through

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~~(5) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (a)(1) through (5) water. Wetlands physically separated from a paragraph (a)(1) through (5) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.~~

Other comments on proposed exclusions:

In general, the agencies should clarify in the text of the final rule that the exclusions are to be read broadly, to avoid the potential that courts will otherwise construe them narrowly. And, the agencies should consider whether exclusion (b)(1) inadvertently creates a negative inference, particularly if read narrowly as an exemption, that regulated parties must demonstrate that their property is not a covered water, rather than the agencies having the burden of demonstrating that they are.

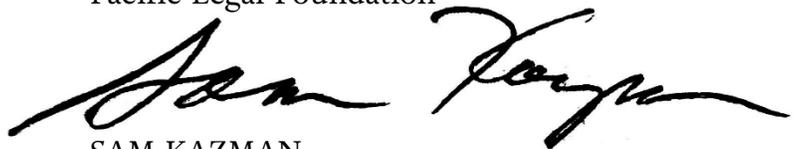
#### Conclusion

We thank the agencies for the opportunity to offer these comments, and are happy to discuss our recommendations further if the agencies would like. You can reach us by contacting Tony Francois at [tfrancois@pacificlegal.org](mailto:tfrancois@pacificlegal.org), or at (916) 503-9041.

Sincerely,



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A handwritten signature in black ink that reads "Jerome Rosa". The signature is written in a cursive style with a large, sweeping initial 'J'.

JEROME ROSA  
Executive Director  
Oregon Cattlemen's Association

A handwritten signature in black ink that reads "Sarah Ryan". The signature is written in a cursive style with a large, sweeping initial 'S'.

SARAH RYAN  
Executive Vice President  
Washington Cattlemen's Association